Supreme Court, U.S.
FILED

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No.

In The
Supreme Court of the United States

SAE JOON KIM,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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May 24, 2010

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QUESTIONS PRESENTED

Petitioner, Sae Joon Kim asks that this Court issue a writ of certiorari to make the following determinations:

1. To determine if the Ninth Circuit Court of Appeals abused its appellate jurisdiction when it made its determination on a defense of equitable estoppel where a) such a defense was not provided the opportunity to be fully litigated in the lower courts, and b) where Petitioner was not given the opportunity to present a complete record for this defense, and

2. To resolve the inconsistent treatment of a defense of equitable estoppel by the United States Court of Appeals in cases involving the United States Government.

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CITATION TO OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit, *Kim v. Holder*, Docket No 06-72725, is attached to this petition as Appendix A at 1a. The agency opinion issued by the Board of Immigration Appeals, In re Sae Joon Kim a.k.a. Kim Sae J , File No A70-459-936 (BIA May 16, 2006), is attached hereto as Appendix B at 4a The oral decision of the immigration judge is attached as Appendix C at 8a (June 24, 2005).

STATEMENT OF JURISDICTION

The Court of Appeals for the Ninth Circuit entered its memorandum denying the timely submitted petition for review on March 17, 2010. *See* Appendix A at 1a.The mandate was subsequently issued by the Ninth Circuit on May 11, 2010, see Appendix D at 12a. The order denying review of the agency appeal is attached hereto as Appendix A at 1a This Honorable Court's jurisdiction is hereby invoked pursuant to 28 U S C. §1254, as the decision below served to deprive Mr. Kim of his due process rights as granted under the Constitution of the United States

CONSTITUTIONAL AND STATUTORY PROVISIONS

Central to matters are the Fifth Amendment rights granted to aliens seeking relief from the Courts of the United States, stated in Amendment, in pertinent part, that "No person . shall be deprived of life, liberty, or property, without due process of law." Prior to order for deportation Petitioner was not provided the opportunity to delve into the detailed evidence that

should be part of the record supporting his claim for estoppel. Not been given the opportunity to develop his claim for estoppel violated Petitioner's due process

I. STATEMENT OF THE CASE

Mr Kim, a Korean immigrant, entered the United States on August 7, 1990 His Notice to Appear dated June 20, 2003 charged him with removal pursuant to INA §§237(a)(1)(A) and 212(a)(7)(A)(i)(I). (R 572-573) On June 24, 2005 the Immigration Judge ordered removal of Petitioner. *See* Appendix C at 10a. On June 28, 2005, Petitioner, through his counsel, moved the Board of Immigration Appeals ("BIA") to reconsider the Immigration Judge's decision removing Petitioner The motion to reconsider was made on the grounds that the government should have been estopped from charging respondent with removability pursuant to INA §§237(a)(7)(A)(i)(I) and 237(a)(1)(A) based on government's unclean hands for its involvement in fraud and the lack of Petitioner's opportunity to develop the record and argument supporting estoppel. On May 16, 2006 the BIA issued an order dismissing Petitioner's appeal. *See* Appendix B at 7a.

II. SUMMARY OF ARGUMENT

Mr. Kim hereby asserts that the Immigration Judge, consistent with precedent of the Supreme Court of the United States, determined that the immigration court had no authority to make a determination on a defense of estoppel This determination by the Immigration Judge resulted in a defective record that failed to contain the necessary evidence and facts to support Mr Kim's estoppel defense. This deficient

record failed to provide the Court of Appeals for the Ninth Circuit with the evidence to properly review a defense of estoppel

Mr Kim further asserts that the Court of Appeals for the Ninth Circuit not only based its analysis for estoppel on a deficient record, but also applied an analysis inconsistent with the authority set out by the Supreme Court of the United States. The practical result of this flawed decision will be to eliminate Petitioner's ability to apply a defense of estoppel against the United States Government in an immigration matter

III. ARGUMENT IN SUPPORT OF PETITION

A. Estoppel due to violations of due process.

The court found in the *Matter of Thornburgh*, 869 F 2d 1503, 1512 (D C. Cir 1989) that the government may be estopped from deportation for violations of due process protections of applicants The failure to comply with the due process rights of Appellants for deportation should result in the estoppel of claims of deportation Implications of wrongdoing through violations of due process cannot lead to deportation. The DHS should be estopped from deporting Appellant based on the violations of due process suffered by Petitioner.

The record fails to unveil the details of how the government employee was able to protect himself from criminal prosecution and threats against his life by trading a list of immigrants who had been living law abiding lives in the United States for many years.

Deporting these immigrants without providing them the opportunity to build their estoppel defenses against the actions of this government employee violates the due process rights of Petitioner and each of these affected immigrants.

B. The DHS should be Estopped from removal of Petitioner.

Estoppel is appropriate only where the government committed affirmative misconduct and not merely false processing functions *Santamaria-Ames v INS*, 104 F.3d 1127 (9th Cir. 1996), *Cadwalder v. Andrus*, 45 F 3d 297 (9th Cir. 1995) Petitioner has been entangled within the bribery and fraud convictions of a former INS agent This entanglement only resulted in Petitioner's prosecution by the DHS after the government employee traded names of immigrants in exchange for leniency in crimes he was being prosecuted for. The criminal misconduct committed by the agent of the Government resulted in Petitioner's prosecution for removal Petitioner should be provided the opportunity to present a complete defense of estoppel given the self-serving purposes that embroiled Petitioner into the government employee's wrongdoing Anything short of a full record supporting estoppel violates Petitioner's due process rights

Claims of estoppel against the government apply only when the government's wrongful acts will cause serious injustice and the public's interest will not suffer undue damage by imposition of the liability. *Morgan v Heckler*, 779 F.2d 544 (9th Cir. 1985), *Mukherjee v INS*, 793 F 2d 1006 (9th Cir 1986) Enforcement of deportation of Petitioner will result in serious injustice to Petitioner who has created a

successful life in the United States based on his reliance on the issued immigration status for more than ten years. Similarly, the public's interest is served by allowing Petitioner to remain in the United States and not sever his relationship with this country that will include aspects such as business, education and societal ties. Estoppel is an appropriate remedy in order to prevent severe injustice to Petitioner. *U.S. v Omdahl*, 104 F.3d 1143 (9th Cir. 1997), *Jaa v INS*, 779 F.2d 569 (9th Cir. 1986). Petitioner will suffer a severe injustice if forced to move to South Korea after spending his formative years in the United States, growing up and leading the only life he knows.

No evidence has been presented that shows that Petitioner or his family was aware of the bribery and fraud committed by Sustaire. Estoppel of actions by the Government is appropriate where Petitioner was ignorant of the true criminality committed by the Government and where Petitioner relied upon those actions as true. *S&M Inv. Co. v. Tahoe Reg'l Planning Agency*, 911 F.2d 324. Petitioner relied upon the issuance of immigration papers and lived a productive life in the United States at the cost of terminating any meaningful ties with a life in South Korea only after relying on the issuance of immigration papers in the United States. The Government should be estopped from shattering a stable life and forcing Petitioner to leave this country and begin life anew in another country that is now foreign.

CONCLUSION

For the reasons set forth above, Petitioner requests that this Court assume jurisdiction over this case, and find that Petitioner's appeal should be granted and that the decision of the BIA and Immigration Judge and the deportation actions be terminated based on a defense claim of estoppel

Respectfully submitted,

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